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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

EVERPORT TERMINAL SERVICES and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1546, AFL-CIO AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1546, AFL-CIO, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO	Case 32-CA-172286 Case 32-CB-172414 **ANSWERING BRIEF TO EXCEPTIONS**

I. INTRODUCTION

This brief is being filed in opposition to the Exceptions filed by the ILWU and Everport Terminal Services.

We first address the remedial issue. The Administrative Law Judge found that a Broad Order was necessary against the ILWU. What is significant for the scope of the remedy is the extraordinary position that the ILWU, supported by Everport Terminal Services, is taking. In effect, the ILWU argues that it is in a unique position and that the restrictions contained in Section 8(a)(2), 29 U.S.C. § 158(a)(2), do not apply on the docks on the West Coast. The position taken before the Board by the ILWU reinforces the need for the Broad Order.

After addressing the need for the Broad Order, we briefly address the legal issues. We rely upon the arguments made by the General Counsel in his Answering Brief.

II. THE ILWU HAS NOT PROPERLY EXCEPTED TO THE BROAD ORDER

The Administrative Law Judge recommended a Broad Order. See ALJ Decision, p. 79:1-25.

The ILWU did file an Exception as to that remedy. See Exception No. 6.[1]

However, that Exception should be disregarded because the ILWU did not brief that Exception. There is no reference in the ILWU's brief to the Broad Order issue.[2] The only issue as to remedy involves its discussion of whether *Love's Barbeque*, 245 NLRB 78 (1979), applies.

The failure to address this remedial issue in its brief forecloses the Board's consideration of that issue. See *Deep Distributors of Greater N.Y.*, 365 NLRB No. 95 (2017), and *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB 1225 (2014). The Board's Rules and Regulations require briefing in support of Exceptions. ILWU having failed to brief that issue, the issue is not before

[1] References are to Corrected Separate Exceptions and Corrected Joinder.

[2] The ILWU attempts to avoid the need to brief the issue by referring to the Exceptions filed by Everport Terminal Services (ETS). That is not a brief on the exception. Moreover, ETS is not subject to the Broad Order and has no basis to take exception to a part of the Order that does not affect it.

the Board and cannot be considered. The ILWU has forfeited any argument as to the Broad Order.

However, should the Board disagree that that issue is before the Board, we address it.

This is the third time that the ILWU has unlawfully accepted recognition of employees in violation of Section 8(b)(1)(A) and (2). In the two previous occasions, the ILWU has not accepted the Board's decision. This compels a Broad Order. See *Ports America Outer Harbor, LLC*, 366 NLRB No. 76 (2018),[3] and *PCMC*, 362 NLRB No. 120 (2015), enfd. 890 F.3d 1100 (D.C. Cir. 2018). The ILWU is a repeat violator of the Act insofar as that conduct is concerned. See also *Int'l Longshore & Warehouse Union (ICTSI, Inc.)*, 363 NLRB No. 12 (2015), enfd. 705 F. App'x 1 (D.C. Cir. 2017), and *Int'l Longshore & Warehouse Union (ICTSI Oregon, Inc.)*, 363 NLRB No. 47 (2015), enfd. 705 F. App'x 3 (D.C. Cir. 2017) (concerning related conduct over jurisdiction).[4] What is most egregious is that, in the face of the Board Order in *PCMC*, the ILWU maintained its right to represent the employees at PAOH and lost. A broad remedy is necessary and appropriate here. Cf. *Local 259, UAW (Russell Motors, Inc.)*, 198 NLRB 351, 352 (1972), and *Retail Clerks Local 588 (Raley's Inc.)*, 227 NLRB 670 (1976), enfd. 587 F.2d 984 (9th Cir. 1978).

To be clear, the remedy must apply to the acceptance of recognition under the PCL&CA on a coast wide multi-employer basis. The ILWU has asserted that any group of new employees automatically accretes. The ILWU maintains that position in this case and will never retreat from this position. That position was rejected by the Board in *PCMC*.[5] That position was

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[3] This is pending a petition for review and petition for enforcement in the D.C. Circuit. Oral argument is scheduled for January 25, 2019. It is likely this case will be decided before the Board considers this matter.

[4] This dispute over work has spawned numerous cases including proceedings initiated under 29 U.S.C. § 160(l). This repeated refusal to comply with provisions of the Act supports the need for a Broad Order. All tribunals that have reviewed the facts of this dispute have held that the ILWU sought to expand its collective bargaining agreement to seize work controlled by an employer outside the bargaining unit and did so by engaging in unlawful coercive secondary conduct. See, e.g., *Hooks v. Int'l Longshore & Warehouse Union*, 544 F. App'x 657 (9th Cir. 2013); *Hooks v. Int'l Longshore & Warehouse Union*, 905 F. Supp. 2d 1198, 1211 (D. Or. 2012).

[5] There is no stay, so the decision is final. 29 U.S.C. § 160(g).

rejected by the Board in *Ports America Outer Harbor*. It is not legally tenable. However, ILWU has demonstrated that it will never retreat from that position, so a Broad Order is necessary. To avoid future disputes, the remedy must make it clear that the ILWU may not accept recognition of any new units under the PCL&CA absent an NLRB-conducted election, which may include an *Armour-Globe* election. This would be appropriate even absent a "proclivity" to violate the Act since the ILWU's position, as stated in *PCMC, Ports America Outer Harbor* and this case, is contrary to the law, and the ILWU has manifested intent to continue this unlawful conduct. The appropriate language is found in *Port Chester Nursing Home,* 269 NLRB 150 (1984):

> In any manner restraining or coercing employees of Respondent Employer, or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, including accepting recognition from any employer where Respondent Local 6 does not represent an uncoerced majority of employees in an appropriate unit of said Employer, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

The critical language is "any employer." Here, it is clearer since all employers become party to one contract, the PCL&CA.

As we argued in our Cross-Exceptions, any remedy in this case with respect to recognition should not be limited to the employees at Ben E. Nutter Terminal. Rather, the ILWU maintains that any group working for any employer that is signatory to the PCL&CA-PMA agreement must automatically recognize the ILWU, irrespective of the circumstances and historical representation of the employees. This principle applies throughout the West coast. ILWU thus takes the position that any group of employees working for any signatory employer automatically is covered by the ILWU PCL&CA coast wide agreement. It rejects the successorship doctrine at least when it comes to employees working on the waterfront who are represented by any other union. In order to remedy this automatic, unqualified assertion of unlawful recognitional status, the remedy must require that no group of employees be accreted to the unit without either a Board election conducted under *Armour-Globe,* or a finding by the Board of a unit clarification petition to accrete the employees. Absent such protection, the

ILWU will continue to force employers to recognize it and to bring employees under the PCL&CA unlawfully.

The ALJ inadvertently provided limited language in the Order:

> 1. Cease and desist from:
>
> a. Accepting assistance and recognition from Respondent Everport Transport Services, Inc., as the exclusive collective bargaining representative of unit employees at a time when ILWU did not represent an uncoerced majority of the employees in the units and when the Machinists were the exclusive collective-bargaining representative of the employees in the units.
>
> b. Maintaining and enforcing the PMA-ILWU Agreement (PCLCD), or any extension, renewal, or modification thereof, including its union-security and hiring hall provisions, so as to cover the unit employees, unless and until ILWU has been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

See ALJ Decision, p. 83.

Paragraph b must be amended to read:

> Maintaining and enforcing the PMA-ILWU Agreement (PCLCD), or any extension, renewal, or modification thereof, including its union-security and hiring hall provisions, so as to cover any unrepresented or employees represented by any other labor organization, unless and until ILWU has been certified by the National Labor Relations Board as the collective-bargaining representative of those employees.

The language as drafted by the ALJ would only affect the ETS employees and not others who, in the future, would be unlawfully brought under the PCL&CA. The Notice must similarly be modified.

The position the ILWU has taken in each of these prior cases, as well as this case, compels the issuance of a Broad Order. This isn't an issue of whether it violated the Act in a certain circumstance. Rather, ILWU argues broadly and forcefully that it is always entitled to recognition of any group added to the bargaining unit on a pre-hire basis. It argues it is not subject to Section 8(a)(2) and that, given the history and scope of the PCL&CA, it is always entitled to recognition. Thus, it is clear that its position in its Exceptions and position before the Board is inconsistent with complying with the Act with respect to any new group of employees, represented or unrepresented. It will continue to take the position that any group of represented

or non-represented employees are automatically included within the bargaining unit, irrespective of how that is achieved. Thus, its position to the Board compels the need for a Broad Order to ensure that in the future, there will be no further unlawful recognition of the ILWU by employers.

For these reasons, the Broad Order is particularly necessary in this case because of the ILWU's consistent and unwavering position, which it has litigated to the end in every case. Because it continues to maintain that position in this case, only a Broad Order, making it clear that this position will not be sustained on an ongoing basis will serve the purposes of a remedy. This is the only way to preserve the Section 7 rights of employees to maintain a historic representative of their choice and maintain stability on the waterfront.

III. THE ALJ'S DECISION IS SUPPORTED BY BOARD LAW; THE ILWU AND EVERPORT ARE NOT EXEMPTED FROM THE RESTRICTIONS OF THE ACT BECAUSE THEY ARE IN SOME UNIQUE POSITION TO ENGAGE IN UNLAWFUL AND PREMATURE RECOGNITION

The ILWU and ETS claim that ETS had lawfully recognized the ILWU when it joined the PMA six months before the terminal opened. They then argue that once Joe Gregorio chose not to assume the maintenance work, ETS had a contractual obligation to hire ILWU members from the dispatch hall. In essence, both claim ETS was a "perfectly clear successor."[6] These arguments were effectively rejected by the ALJ. We adopt and agree with the arguments made the General Counsel in his Answering Brief. See also *Ports America Outer Harbor*, 366 NLRB No. 76.

IV. CONCLUSION

For the reasons suggested in the Decision of the ALJ and the Brief of Counsel for General Counsel, the Decision of the ALJ should be affirmed with the exception of the issues raised by Counsel for the General Counsel's Limited Exceptions and the Cross-Exceptions of the

[6] This is the reason the Charging Party should be able to litigate those issues raised in its Cross-Exceptions such as the validity of dispatch hall and the legitimacy of the PMA as a multi-employer group.

Charging Party. Otherwise, the Decision and Order should be affirmed in all regards, and the Exceptions of ETS and the ILWU should be rejected.

Dated: January 9, 2019

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On January 9, 2019, I served the following documents in the manner described below:

ANSWER BRIEF TO EXCEPTIONS

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 9, 2019, at Alameda, California.

/s/ Karen Kempler
Karen Kempler